IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 503 of 2003
in
SPECIAL CIVIL APPLICATION No 7113 of 1992
with
CIVIL APPLICATION No. 2002 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ISHWARBHAI NAROTTAMBHAI PATEL
Versus
K H TRIVEDI

Appearance:
1. LETTERS PATENT APPEAL No. 503 of 2003
MR BS PATEL for Appellant No.
MRS RANJAN B PATEL for Appellant No.
DELETED for Respondent No. 1
MR PUSHPADATTA VYAS for Respondent No. 2
MR SJ DAVE, AGP for Respondent No. 3

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE M.S.SHAH
Date of Order: 24/06/2003

ORAL JUDGMENT

(Per : MR.JUSTICE M.S.SHAH)

This appeal is directed against the judgment and order dated 16.8.2002 rendered by the learned Single Judge dismissing a group of three petitions. The present appeal is confined to the said judgment in so far as Special Civil Application No. 476 of 1993 is dismissed.

2. The present appeal is filed under Clause 15 of the Letters Patent and the learned counsel was called upon to address the Court on the question of maintainability of the appeal. The matter has, therefore, been heard at length on this preliminary issue.

3. Before discussing the said preliminary issue, it is necessary to set out the brief facts of the case at hand.

3.1 The appellant (petitioner of Special Civil Application No. 476 of 1993 Durlabbhai P Patel) and others were members of the Executive Committee of Shree Khedut Sahakari Khand Udyog Mandali Ltd., a registered Co-operative Society, at Bardoli in Surat District (hereinafter referred to as "the Society"). The society had initially invited offers for supply of certain machineries for its sugar factory and the contract on turn-key basis was granted to one Bardoli Engineering Works as per the resolution dated 22.5.1984 for an amount of Rs.13,74,000/-. In the order accepting the offer of the aforesaid party, it was specifically stated that the amount of tax and erection charges are included. However, when the machinery was actually installed, the supplier issued a bill of Rs.45,51,000/-. The Executive Committee sanctioned an amount of Rs.23,41,000/- as against the initial contract of Rs.13,74,000/-. Pursuant to an audit objection, as per the directions dated 27.12.1989 of the Director of Sugar, Gujarat State, an enquiry was held under Section 93 of the Gujarat Co-operative Societies Act, 1961 (hereinafter referred to as "the Act") covering the period from October, 1984 to September, 1986. The Inquiry Officer submitted a report holding that all the four members of the Executive Committee at the relevant time, were liable to pay a sum of Rs.1,45,000/- and accordingly the liability of each of them was fixed at Rs.36,250/-. The Inquiry Officer also fixed the liability of one Dilip S. Bhavsar at Rs.10,08,504/-. However, as far as the dispute regarding the liability of said Mr Bhavsar is concerned, we are not

concerned with the same as the Gujarat State Co-operative Tribunal (hereinafter referred to as "the Tribunal") had remanded the matter in respect of the liability of said Mr Bhavsar.

3.2 As far as the liability of four members of the Executive Committee including the present appellant is concerned, the matter was carried in appeal before the Tribunal under Section 153(3) of the Act. The appeal came to be heard and dismissed by the Tribunal consisting of its President (who is a retired Judge of the City Civil Court at Ahmedabad) and another Member of the Tribunal. Aggrieved by the aforesaid judgment of the Tribunal, the appellant herein filed Special Civil Application No. 476 of 1993. The three other members filed the other petitions.

3.3 After hearing the learned counsel for the parties, the learned Single Judge dismissed the petitions by common judgment dated 16.8.2002 which is under challenge in this appeal, in so far as dismissal of Special Civil Application No. 476 of 1993 is concerned.

4. Mr BS Patel, learned counsel for the appellant has submitted as under :-

4.1 The petition giving rise to the present appeal was filed under Articles 226 and 227 of the Constitution and the learned Single Judge has also exercised the powers under both the said Articles and, therefore, the present appeal is maintainable under Clause 15 of the Letters Patent. The learned counsel has relied on the decisions of the Apex Court in Umaji Keshao Meshram vs. Radhikabai, AIR 1986 SC 1272, Ratnagiri Distt. Central Coop. Bank Ltd. vs. Dinkar Kashinath Watve, 1993 Supp (1) SCC 9 and Lokmat Newspapers (P) Ltd. vs. Shankarprasad, (1999) 6 SCC 275 and also the decision of a Full Bench of this Court in Dilavarsinh Khodubha vs. State of Gujarat, 1995(1) GLR 110 and a Division Bench of this Court in Mohanbhai Ramjibhai vs. Dy. Executive Engineer, 1998(2) GLH 44.

4.2 In the memo of the Special Civil Application, the petitioner had invoked his fundamental rights under Articles 14 and 19 of the Constitution and had prayed for a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction for quashing and setting aside the orders of the Registrar under Section 93 of the Act and the judgment of the Gujarat State Co-operative Tribunal confirming the same and the petitioner had also prayed

for a declaration that the petitioner is not liable for any liability as decided by the Inquiry Officer. The petitioner had thus invoked the writ jurisdiction under Article 226 of the Constitution rather than the power of superintendence under Article 227 of the Constitution. Hence, the Letters Patent Appeal should be held to be maintainable.

4.3 Relying on the submissions made in ground (n) in the memo of the petition which contained the grounds of challenge to the constitutional validity of Section 93 of the Act, it is submitted that it was because the petition was filed under Article 226 that such a ground was taken in the petition, but the learned Single Judge did not allow any amendment to the petition for adding the prayer for the said challenge on the ground that the prayer for amendment was made at a belated stage.

4.4 Reference is made to the observations made by the learned Single Judge in paragraphs 13 and 19 of the petition for submitting that the learned Single Judge has exercised powers under Articles 226 and 227 of the Constitution.

5. We have given anxious and thoughtful consideration to the submissions made and the decisions cited by the learned counsel for the appellant. All the decisions of the Apex Court cited by the learned counsel have been considered in the latest decision in Kanhaiyalal Agrawal vs. Gwalior Sugar Co. Ltd., (2001) 9 SCC 609. In para 6 of the said decision, the Apex Court has observed as under :-

"6. So far as the law on the matter is concerned, as to whether an appeal would lie against an order made in writ petition before the High Court challenging an order of the Labour Court, this Court in its decision in Lokmat Newspapers (P) Ltd. vs. Shankarprasad, (1999) 6 SCC 275 stated that if a Single Judge exercises jurisdiction under Article 226, letters patent appeal would be maintainable, but if the jurisdiction is exercised under Article 227 it will not be maintainable. But with an explanation that if the Single Judge of the High Court in considering the petition under Article 226 or Article 227 does not state under which provision he had decided the matter and where the facts justify filing of petition both under Article 226 and Article 227 and a petition so

filed is dismissed by the Single Judge on merits, the matter may be considered in its proper perspective in an appeal. This Court held as aforesaid in view of the decisions of this Court in Umarji Keshao Meshram vs. Radhikabai, 1986 Supp SCC 401, Ratnagiri Distt. Central Coop. Bank Ltd. vs. Dinkar Kashinath Watve, 1993 Supp (1) SCC 9 and Sushilabai Laxminarayan Mudliyar vs. Nihalchand Waghajibhai Shaha, 1993 Supp (1) SCC 11."

(emphasis supplied)

6. We may also reproduce the following observations made by the Apex Court in Umaji Keshao Meshram vs. Radhikabai, AIR 1986 SC 1272 = 1986 Supp SCC 401 which has all along been treated as a leading decision on the subject :-

"107. Petitions are at times filed both under Articles 226 and 227 of the Constitution. The case of Hari Vishnu Kamath vs. Syed Ahmad Ishaque, AIR 1955 SC 233 before this Court was of such a type. Rule 18 provides that where such petitions are filed against orders of the tribunals or authorities specified in Rule 18 of Chapter XVII of the Appellate Side Rules or against decrees or orders of courts specified in that rule, they shall be heard and finally disposed of by a Single Judge. The question is whether an appeal would lie from the decision of the Single Judge in such a case. In our opinion, where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under Clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226. Such was the view taken by the Allahabad High Court in Aidal Singh vs. Karan Singh, AIR 1957 All.414 and by the Punjab High Court in Raj Kishan Jain vs. Tulsi Dass, AIR

1959 Pun.291 and Barham Dutt vs. Peoples' Co-operative Transport Society Ltd., New Delhi, AIR 1961 Pun. 24 and we are in agreement with it."

(emphasis supplied)

In view of the above principle, it would appear that in each case the Bench hearing the Letters Patent Appeal would have to examine whether the learned Single Judge had exercised jurisdiction under Article 226 or under Article 227 or if the jurisdiction is exercised both under Articles 226 and 227, whether the jurisdiction is exercised substantially under Article 226 of the Constitution.

In Umaji Keshao Meshram (Supra), the Apex Court also held that a proceeding under Article 227 was not an original proceeding and, therefore, intra-court appeal would not lie against the judgment of a Single Judge of the Bombay High Court given in a petition under Article 227, by reason of such appeal being expressly barred by Clause 15 of the Letters Patent of that High Court. Hence, the question whether the proceeding in which the High Court exercised its jurisdiction is an original proceeding or whether the Single Judge exercising the jurisdiction of the High Court was hearing the matter as a "second" Forum would also be a relevant consideration.

7. In Dilavarsinh Khodubha vs. State of Gujarat, 1995(1) GLR 110, a Full Bench of this Court considered the question whether a party would be justified in invoking the jurisdiction of the High Court under Article 226 against an order made by a Tribunal under the Urban Land (Ceiling & Regulations) Act, 1976. After referring to the above quoted observations of the Apex Court in Umaji Keshao (Supra), the Full Bench examined the scope of writ of certiorari and the nature of the order of the Tribunal. In this context, the Full Bench observed as under :-

"Writ of Certiorari would lie against the orders of subordinate Courts and inferior Tribunals. The High Court has power of superintendence over its Tribunals within its territory, under Art. 227 and, therefore, such Tribunals are inferior Tribunals, amenable to the writ jurisdiction of the High Court under Art. 226 of the Constitution so that writs of Certiorari and Prohibition can issue against them. If such

> Tribunal assumes wrong jurisdiction, it can be stopped by a writ of Prohibition and if it makes an order, which falls within the scope of the writ of Certiorari, the same can be quashed under Art. 226. The object of the writ of Certiorari is to secure that the jurisdiction of the inferior Tribunal should be properly exercised. This writ is issued to direct inferior Courts, Tribunals or authorities, to transmit to the Court record of proceedings pending therein for scrutiny and, if necessary, for quashing the same. As held by the Supreme Court in Harbans Lal v. Jagmohan Saran, AIR 1986 SC 302, a writ in the nature of Certiorari may be issued if the order of the inferior Tribunal or subordinate Court suffers from the error of jurisdiction, or from a breach of the principles of natural justice, or is vitiated by a manifest or apparent error of law. The expression "Tribunal" would include within its ambit, adjudicating bodies, provided they are constituted by the State and are invested with judicial, as distinguished from purely administrative or executive functions (see Durga Shankar Mehta v Raghuraj Singh & Ors., AIR 1954 SC 520). As held by the Supreme Court in All Party Hill Leaders' Conference, Shillong vs. Captain W.A. Sangma & Ors., AIR 1977 SC 2155, the principal test, which must, necessarily, be present for determining the character of the authority as Tribunal, is whether that authority is empowered to exercise any adjudicating power of the State and whether the same has been conferred on it by any statute or a statutory rule."

On going through the grounds taken in the writ petition in that case and the order of the learned Single Judge which was under challenge in the Letters Patent Appeal before the Full Bench, it was held that the petition was considered both under Articles 226 and 227 and that the Letters Patent Appeal was maintainable against an order made by the Single Judge in such petitions challenging the order of the Urban Land Tribunal passed under Section 33 of the Urban Land (Ceiling & Regulations) Act, 1976.

The aforesaid decision is, however, required to be appreciated in the context of the controversy which was raised before the Full Bench. Earlier in Himatlal K Parekh vs. Competent Authority, 1990(1) GLR 626 and in Jasubhai H Gandhi vs. Competent Authority, 1990 (2) GLR

1140, two Division Benches of this Court had held that a Letters Patent Appeal was not maintainable against the judgment of the Single Judge of this Court in a petition challenging the order of the Urban Land Tribunal under Section 33 of the Urban Land (Ceiling & Regulations) Act, 1976 because such a petition against the order of the Tribunal had to be treated as a petition under Article 227 of the Constitution, even if the petition purported to be under Articles 226 and 227 of the Constitution.

The Full Bench overruled the aforesaid view and relying on the decision of the Apex Court in Umaji's case (Supra) held that the Court has to apply the test laid down by the Apex court in Umaji's case. The Full Bench, therefore, did not lay down that the petition challenging the order of every Tribunal had to be necessarily treated as a petition under Article 226 in every case.

8. In Mohanbhai Ramjibhai vs. Dy. Executive Engineer, 1998(2) GLH 44, another Division Bench of this Court examined the question whether a Letters Patent Appeal would lie against the judgment of a Single Judge in a petition challenging the award of the Labour Court. The Division Bench followed the principles laid down in the aforesaid Full Bench decision in Dilavarsinh (Supra) and held that since the petitioner had prayed for a writ of certiorari against the award of the Labour Court, the petition was treated as one under Article 226 of the Constitution and Letters Patent Appeal would be maintainable.

9. However, in our view, the law on the subject must now be treated as settled by the recent decision of the Apex Court in Kanhaiyalal Agrawal's case (Supra). Having regard to the said decision, all the previous decisions of the Apex Court and also the decisions of this Court including the judgment of the Full Bench in Dilavarsinh Khodubha (Supra) and the Division Bench judgement in Mohanbhai Ramjibhai (Supra) will have to be read in light of the said decision of the Supreme Court in Kanhaiyalal Agrawal's case (Supra).

10. Before proceeding further, we may also notice the provisions of Article 235 and the decision of the Apex Court in State of Maharashtra vs. Labour Law Practitioners' Association, AIR 1998 SC 1233, interpreting the said Article and other Articles in Part V, Chapter VI of the Constitution. Article 235 provides that the administrative control over district Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons

belonging to the judicial service of a State and holding any post inferior to the post of district judges shall be vested in the High Court. After a review of its previous decisions and decisions of several High Courts on the subject, the Apex Court has held in the aforesaid decision of State of Maharashtra that bearing in mind the principle of separation of powers and independence of the judiciary, Industrial and Labour Courts are Courts subordinate to the High Court within the meaning of Article 235 of the Constitution and, therefore, appointments of Judges in those Courts will have to be made in consultation with the High Court. The Court also quoted with approval the decision of a Full Bench of the Bombay High Court in the case of Shripatrao Dajisaheb Ghatge v. The State of Maharashtra, AIR 1977 Bombay 384 (FB), wherein the term "Courts" was held to cover all tribunals which were basically Courts performing judicial functions giving judgments which were binding and exercising sovereign judicial power transferred to them by the State. It was held that High Court could exercise its jurisdiction under Article 227 over all such tribunals.

11. When a Single Judge has not stated whether he has exercised jurisdiction under Article 226 or 227, while deciding a petition challenging the decision of a Court or Tribunal which is subordinate to the High Court and which is presided over by a sitting or a retired judicial officer, we see no reason why the Letters Patent Bench should not raise a strong presumption that the Single Judge has exercised the jurisdiction under Article 227 of the Constitution. In such a case, the litigant has already had his case tried before atleast two judicial fora - first before the subordinate Court/Tribunal and then before a Single Judge of the High Court. In our view, this perspective may not fail the test of justice, fairness and propriety, if we look at the language of the provisions of Clauses 15 and 44 of the Letters Patent from this angle alongwith the legislative interventions restricting the number of civil appeals.

Clause 15 of the Letters Patent of Bombay High Court as applicable to this Court reads as under :-

"15. Appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction :- And we do further ordain that an appeal shall lie to the said High Court of Judicature at Bombay from the judgment not being a judgment passed in the exercise of appellate

jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, and not being a sentence or order passed or made in exercise of the power of superintendence under the provisions of Sec. 107 of the Government of India Act, or in the exercise of criminal jurisdiction of one Judge of the said High Court or one Judge of any Division Court, pursuant to Sec. 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, on or after the first day of February, 1929 in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to us. Our heirs or successors in Our or Their Privy Council, as hereinafter provided."

Clause 44 of the Letters Patent reads as under :-

"44. Power of the Indian Legislature preserved:And we do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Government-General in Legislative Council and also of the Government-General in Council under Section seventy-one of the Government of India Act, 1915, and seventy-two of that Act, and may be in all respect amended and altered thereby."

Accordingly, a Letters Patent Appeal is not maintainable against a judgment not being a sentence or order passed or made in exercise of the powers of superintendence under the provisions of Section 107 of the Government of India Act (1915) corresponding to Article 227 of the Constitution. A Letters Patent Appeal is also not maintainable against an order made in

exercise of revisional jurisdiction. Before insertion of Section 100-A in the Code of Civil Procedure, 1908, a Letters Patent Appeal was not maintainable against the judgment of a Single Judge of the High Court in numerically second appeal, without the certificate of the Single Judge who passed the judgment that the case is a fit one for appeal. By Section 100-A inserted by the Code of Civil Procedure (Amendment) Act, 1976, the Letters Patent Appeal against the decision of a Single Judge in numerically "second" appeal was abolished. In view of the amendment of Section 100-A CPC by the Code of Civil Procedure (Amendment) Acts 1999 and 2002 with effect from 1.7.2002, now no Letters Patent Appeal is maintainable even against the judgment of a Single Judge in "first" appeal meaning thereby the Legislature has now abolished the numerically "second" appeal before a "third" judicial forum. In this connection, a reference may be made to the judgment of the Hon'ble Supreme Court in Municipal Corporation of Brihanmumbai vs. State Bank of India, AIR 1999 SC 380 which interpreted Section 100-A of the Code of Civil Procedure, 1908 after its insertion by the Amendment Act, 1976 but before its amendment by the Amendment Acts, 1999 and 2002, and also to the judgment of a Full Bench of this Court in Nasik Hing Supplying Co. vs. Annapurna Gruh Udyog Bhandar, 2003 (2) GLR 926.

Considered in this light, when a litigant has already had his case considered by the two judicial fora - first before the subordinate Court/Tribunal and again before a Single Judge of the High Court, we are of the view that it would not be unfair, unjust or improper to hold that a Letters Patent Appeal would not be maintainable against a judgment of a Single Judge in a petition challenging the decision of a Court or Tribunal subordinate to the High Court which is presided over by a sitting or a retired judicial officer.

12. Accordingly, the following principles would have to be applied while considering the question about maintainability of a Letters Patent Appeal against the judgment of a Single Judge in a petition under Article 226 and/or Article 227 of the Constitution :-

(i) Whether the petitioner has invoked jurisdiction of this Court under Article 226 or Article 227, if the learned Single Judge has exercised jurisdiction under Article 226, Letters Patent Appeal would be maintainable.

(ii) If the judgment rendered by the learned Single

Judge is in exercise of jurisdiction under Article 227 of the Constitution, Letters Patent Appeal would not be maintainable.

(iii) If the Single Judge has not stated whether he has exercised his jurisdiction under Article 226 or 227 of the Constitution, it would be relevant to examine whether the proceeding in question is an original proceeding or the proceeding challenges the decision of a Tribunal. If the proceeding is original, the petition would obviously be under Article 226.

If the petition challenges the decision of a Tribunal, further inquiry should ensue. The expression "Tribunal" would include within its ambit adjudicating bodies, provided they are constituted by the State and are invested with judicial, as distinguished from purely administrative or executive functions. The principal test of determining the character of the authority as Tribunal is whether that authority is empowered to exercise any adjudicating power of the State and whether the same has been conferred on it by any statute or a statutory rule.

If the Tribunal or the Court has exercised judicial function of the State as explained in the decision of the Apex Court in State of Maharashtra vs. Labour Law Practitioners' Association, AIR 1998 SC 1233 and the Tribunal or the Court is subordinate to the High Court within the meaning of Article 235 of the Constitution, then a presumption will be raised that the Single Judge has exercised his jurisdiction under Article 227 of the Constitution.

(iv) If the Single Judge has not stated under which provision he has decided the matter and where the facts justify filing of petition both under Article 226 and Article 227 and the Court has decided the petition on merits, the Letters Patent Bench would consider whether substantial part of the order sought to be appealed against is under Article 226 or not. If it is found that the substantial part of the order sought to be appealed against is under Article 226, Letters Patent Appeal would be maintainable, but not otherwise.

(v) If substantial part of the order sought to be appealed against is under Article 226, Letters Patent Appeal would not become non-maintainable merely because in the final order the Single Judge has given ancillary directions which may pertain to Article 227.

13. Bearing the aforesaid principles in mind, we have carefully examined the judgment and order passed by the learned Single Judge. The first contention which was raised before the learned Single Judge was that the Inquiry Officer was required to examine the question of liability of the members of the Executive Committee during the period between 1.10.1984 and 30.9.1986, but the decision of the Executive Committee of condoning the disputed amount was taken at the meeting held on 20.10.1986, hence the Inquiry Officer had acted beyond his authority.

The learned Single Judge held that the transaction was a continuous one and thereafter made the following pertinent observations :-

"That apart, the petitioners have not raised any of such contentions, neither before the Inquiry Officer, nor even before the Tribunal in the appeal. Even in the memo of petition such contention is not raised, but even if it is stated in the memo of the petition or submitted earlier before this Court, the petitioners cannot be allowed to raise such contention which is rather a mixed contention of facts. It is well settled that when a petition is filed under Article 227 of the Constitution of India or even if it is Article 226 of the Constitution of India, arising from the order passed by the statutory Tribunal in appeal, petitioners cannot be allowed to raise contention on the question of jurisdiction if not raised before the first authority. In the present case, the said contention has not been raised before the appellate authority of the Gujarat State Coop. Tribunal also and, therefore, the petitioners cannot be allowed to raise the contention regarding the jurisdiction of the Inquiry Officer."

It is thus clear that the learned Single Judge treated the petition as one under Article 227 of the Constitution and a reference to Article 226 is made only

on demurrer, that is, even if the petition were to be treated as a petition under Article 226, the learned Single Judge would not have allowed the petitioner to raise the contention in question.

14. The second contention urged before the learned Single Judge was that there was no specific charge regarding the subject matter of the resolution dated 20.10.1986 and, therefore, the Inquiry Officer could not have fastened the liability on the members of the Executive Committee without giving appropriate opportunity. Again the learned Single Judge did not permit such a contention to be raised on the ground that it was not raised before the Tribunal. The learned Single Judge dealt with the said contention in the following terms :-

> "However, Mr Vakharia submitted that when there was no charge, there was no occasion for the petitioners to raise such defence and hence the same would not be reflected in the order. Even if such is the situation, then also the petitioners could have raised such contention before the Tribunal, but the perusal of the order passed by the Tribunal shows that no such contention was raised. Mr Vakharia has not been able to show anything regarding such contention or dealing of such contention by the Tribunal in the order. Of course, Mr Vakharia has tried to show the copy of the charge-sheet issued to the petitioners by the Inquiry Officer. The perusal of the charge-sheet shows that the inquiry was pertaining to the whole transaction with Bardoli Engineering Works, the surplus payment made and non-recovery of the same. One of the items in the charge-sheet itself is of Rs.42,504/- for non-authorised payment of the sales-tax amount which is forming part of the liability, which is condoned by the Executive Committee of the Society and, therefore, it cannot be said that the Inquiry Officer has fastened the liability for which there was absolutely no basis and nothing was found. The said question regarding the non-existence of the charge is a mixed question of law and facts, which the petitioners cannot be allowed to raise at this stage under Article 227 of the Constitution of India, more particularly when such contention is not even raised by the petitioners before the Tribunal and, therefore, the second contention of Mr

Vakharia also fails and hence rejected."

15. The petitioners also prayed before the learned Single Judge to permit them to challenge the constitutional validity of Section 93 of the Act which prayer was not granted by the learned Single Judge on the ground that the petition was filed in the year 1992 and granting the prayer for amendment in the year 2002 would mean further delay in hearing of the petition and also change of the Bench as the learned Single Judge could not have considered the challenge to the constitutional validity of a statute.

The learned counsel for the appellant kept harping on the fact that the memo of the petition contained a ground for challenging the constitutional validity of a statutory provision and, therefore, it was a petition under Article 226 of the Constitution.

If the learned Single Judge had granted the prayer for amendment to the petition to raise the challenge to the constitutional validity of a statutory provision, then such an amended petition would have been a petition under Article 226 of the Constitution in so far as it would involve a challenge to the constitutional validity of a statutory provision. When such a prayer for amendment was not granted, there can be no question of considering the petition as one under Article 226 of the Constitution. Substantially it has been treated as a petition under Article 227 of the Constitution because all the time the Court was examining the submissions made on behalf of the petitioners as to whether the Tribunal had committed any error in confirming the liability fastened by the Inquiry Officer on the petitioners.

16. Even while considering the last contention on the question of interpretation of the provisions of Section 93 of the Act, the Court made the following observations :-

"Therefore, when the legislature has consequently made provisions for not including the disqualification in a matter where the order is passed under Section 96 of the Act, this Court in exercising power under Article 227 or 226 of the Constitution of India can neither substitute the wisdom of the legislature, nor can it be said that the order under Section 93 should not be read so as to attach a permanent disqualification to a person concerned for becoming member of the Managing Committee, which otherwise could not

have been done if the proceedings under Section 96 were to be resorted to. In the present case though there is no proceedings under Section 96 of the Act, the effect of the order under Section 93 of the Act qua the disqualification cannot be deleted or nullified when the legislature has specifically intended to attach the disqualification in respect to order passed under Section 93 only and, therefore, I cannot accept the submission made by Mr Patel that since the society can also resort to the proceedings under Section 96, the order under Section 93 of the Act should not attach the disqualification as provided under Rule 32 of the Act."

In the said observations also, it is important to note that the learned Single Judge referred to the power under Article 227 of the Constitution and a reference to Article 226 has been made because the learned counsel for the petitioners were making submissions before the learned Single Judge as if it was a petition under Article 226 also. That, however, does not mean that the learned Single Judge was exercising powers under Article 226 of the Constitution while considering the contention on merits.

17. In view of the aforesaid, we are clearly of the view that while considering the submissions made on behalf of the petitioners, the learned Single Judge exercised his powers under Article 227 of the Constitution and that the learned Single Judge was not exercising his powers under Article 226 of the Constitution.

18. We may also refer in passing to the observations made by the learned Single Judge that the over payment was sought to be condoned on the ground that there was a change in the design and the quality of the machine supplied by the supplier was good. The learned Single Judge dealt with the said aspect in para 15 of the judgment in the following terms :-

"In the present case, there was absolutely no justification for condoning the amount because the test would be whether any prudent person would allow an amount of Rs.1,45,000/- to let go merely because the supplier had supplied a machinery of good quality or merely because he has earned good profit out of it. The normal conduct of any office bearers of the society or

> even a normal prudent person would insist that the excess payment which is made must be refunded because the price of the machinery which was fixed was for supplying genuine and good quality machinery and investment was with a view to make profit and, therefore, there can be hardly any justification for condoning such amount. The said aspect is coupled with the fact that on internal page 22 of the judgment of the Tribunal it has been recorded that after the supply of the machinery there were correspondences by the Managing Director as per letter dated 7.5.1986 that out of the machinery which was supplied by Bardoli Engineering Works one unit of vertical crystallizer has stopped working or rather it has become out of order and it is also communicated that the expenses for repairing of the same will be recovered by the society. This shows that the contention regarding the good quality of machinery supplied is even factually incorrect."

However, as far as the aforesaid factual aspect is concerned, this Court has not gone into the merits of the controversy about the quality of the machine or the quantum of liability as the appeal is being dismissed on the ground that, being an appeal against the judgment of the learned Single Judge under Article 227 of the Constitution, it is not maintainable.

19. In view of the above discussion, the appeal is dismissed.

20. Since the main appeal is dismissed, Civil Application No. 2002 of 2002 does not survive and is accordingly dismissed.

(KSHITIJ R. VYAS, J.)

(M.S. SHAH, J.)

sundar/-